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No. 92-1921

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MICHAEL E. AITSON,
Petitioner,

v.

LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDA H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED D. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether, as held by the Tenth Circuit Court of Appeals, the members of a state professional licensing board are entitled to absolute judicial immunity from liability under 42 U.S.C. § 1983 for actions arising out of the exercise of adjudicative functions.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

59 Okla.Stat. §§ 328.43-46

These statutes are set forth in the Appendix to this brief.

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COUNTERSTATEMENT OF THE CASE

This case arises out of the revocation of Petitioner Aitson's license to practice dentistry in Oklahoma. In January, 1991, the Respondents (other than Linda Campbell), acting as members of the Oklahoma Board of Governors of Registered Dentists, conducted an administrative hearing in which they heard evidence that Aitson had violated the provisions of previous Dental Board orders.

After hearing the evidence presented, the Respondent Board members voted to revoke Aitson's license.

Petitioner Aitson was not present at the January, 1991 hearing. However, the Dental Board's Executive Director mailed notices of the hearing to Aitson's last known business and residence addresses, according to Board records, as well as to several other addresses that had been obtained for Aitson. Under the terms of previous Dental Board orders, Aitson was obligated to keep the Dental Board informed of his current business and residence addresses.

Following the revocation of his license, Aitson filed a civil rights action in the United States District Court for the Western District of Oklahoma. Aitson sought declaratory and injunctive relief, as well as damages against the members of the Dental Board and its Executive Director. Aitson alleged that, in revoking his dental license,

the Respondents violated his constitutional right to procedural due process under the Fourteenth Amendment to the United States Constitution. The Respondents filed a motion to dismiss in which they argued, *inter alia*, that the Dental Board members were entitled to absolute immunity because the challenged actions were performed in their quasi-judicial capacity. The District Court converted the Respondents' motion to dismiss into a motion for summary judgment and granted summary judgment to the Respondents on all of Petitioner Aitson's claims.

On appeal, the Tenth Circuit reversed the District Court's granting of summary judgment on all of Petitioner Aitson's claims against the Dental Board's Executive Director and on his claims for declaratory and injunctive relief against the individual Board members. However, the Tenth Circuit affirmed the District Court's ruling that the individual Board members were entitled to

absolute immunity as to Aitson's damages claims. The Tenth Circuit remanded the case to the District Court, and the parties are currently pursuing discovery there.

However, although the case is currently pending in the District Court, Petitioner Aitson has requested this Court to grant certiorari on the issue of whether the members of a state licensing board are entitled to absolute judicial immunity for actions arising our of the exercise of quasi-judicial functions.

REASONS WHY THE PETITION SHOULD BE DENIED

I. BECAUSE THE SIXTH CIRCUIT DECISION RELIED ON BY PETITIONER AITSON HAS BEEN OVERRULED, THERE IS NOT A CONFLICT IN THE COURTS OF APPEAL THAT WARRANTS REVIEW BY THIS COURT.

In his Petition for Writ of Certiorari, Aitson contends that there is a conflict in the Courts of Appeal on the issue of whether members of state licensing boards are entitled to absolute immunity for actions arising out of the exercise of adjudicative functions. Aitson notes that both the First and Tenth Circuits have held that board members are entitled to such immunity, but maintains that the Sixth Circuit has reached a different conclusion. See Bettencourt v. Board of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990) (absolute immunity applied where the defendant board members revoked the plaintiff doctor's license); Horwitz v. State Board of Medical Examiners, 822 F.2d 1508 (10th Cir.), cert. denied 484

U.S. 964, 108 S.Ct. 453, 98 L.Ed.2d 394 (1987) (absolute immunity applied where defendant board members suspended the plaintiff doctor's license); Manion v. Michigan Board of Medicine, 765 F.2d 590 (6th Cir. 1985).

However, Aitson neglects to inform the Court that the Sixth Circuit decision in Manion has been overruled. In Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992), the Court held that the members of the Tennessee Board of Medical Examiners, when sued individually for damages on a claim filed under 42 U.S.C. § 1983, were entitled to absolute, quasi-judicial immunity. The Court wrote:

> But except for Manion, the case law in this circuit and elsewhere is very clear: public policy requires absolute immunity for officials performing quasi-prosecutorial or quasi-judicial functions, at least where the protections such as those provided by the Administrative Procedures Act are in place, because of the likelihood that exposure to the 'burden of a trial and to the inevitable danger of its

> outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'

978 F.2d at 275, quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950). Accordingly, the Watts Court expressly stated, "[T]o the extent that the Manion decision is inconsistent with the views here expressed, the decision is overruled." 978 F.2d at 278.

In light of the Sixth Circuit's ruling in Watts, there is no longer a conflict in the decisions of the Courts of Appeal that warrants review by this Court.

II. THE TENTH CIRCUIT'S DECISION IS SUPPORTED BY DECISIONS OF THIS COURT.

Contrary to Petitioner Aitson's arguments, the decisions of this Court support the granting of absolute immunity for members of state licensing boards for

actions arising out of the exercise of adjudicative functions. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this Court expressly held that executive officers engaging in judicial acts were entitled to absolute immunity. This Court found administrative adjudication sufficiently analogous to the judicial process, such that the reasons supporting absolute immunity for judges were equally applicable to officials serving in a quasi-judicial capacity in administrative agencies.

Decisions by Courts of Appeal, such as Bettencourt, Horwitz, and Watts have followed Butz by applying a three part functional inquiry to determine whether particular executive officers function in a quasi-judicial capacity such that they are entitled to absolute immunity. These courts have asked: (1) whether a board member, like a judge, performs a

traditional adjudicatory function in that he or she decides facts, applies law, and otherwise resolves disputes on the merits free from direct political influence; (2) whether a board member, like a judge, decides cases sufficiently controversial that, in the absence of absolute immunity, he or she would be subject to numerous damages actions; (3) whether a board member, like a judge, adjudicates disputes against the backdrop of multiple safeguards designed to protect constitutional rights. See Bettencourt, 904 F.2d at 772. As noted above, the First, Sixth and Tenth Circuits have concluded that members of state licensing boards performed functions sufficiently analogous to judges to warrant a grant of absolute immunity.

In the instant case, the reasoning of Butz, Bettencourt, Horwitz and Watts supports the Tenth Circuit's decision

granting absolute immunity to the Respondent Dental Board members. Just as the judicial officers considered in those cases, the members of the Oklahoma Dental Board perform adjudicatory functions in determining whether to impose disciplinary action against individual dentists. The Board members hear evidence, make factual determinations, and apply legal principles to those facts. Moreover, as this case demonstrates, the members of the Dental Board adjudicate cases that are sufficiently controversial such that they are likely to result in actions for damages against them. Finally, just as the officers in those cases, a number of procedural safeguards apply to the actions of the Oklahoma Dental Board. Under the Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1 et seq., dentists such as Petitioner Aitson are entitled to formal notice of the charges against them, the opportunity

to present evidence and arguments to rebut the allegations against them, and the right to appeal the Dental Board's rulings to the Oklahoma district courts and, ultimately, to the Supreme Court of Oklahoma. See 59 O.S. § 328.43-46.

Accordingly, the Tenth Circuit properly held that the Respondent Dental Board members are entitled to absolute immunity. Review by this Court is not warranted.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Dated, Oklahoma City, Oklahoma, July 1, 1993.

Respectfully submitted,

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APPENDIX:
59 Okla. Stat. § 328.43-46

§328.43. Appeals -- Jurisdiction and Venue -- Stays

Jurisdiction and venue for appeal from the decision of the Board of Governors shall be in the district court of the State of Oklahoma in all cases involving the revocation, suspension, probation or reprimand of license or certificate or the holder thereof as in this act provided. Notice of intention to appeal from a decision of the Board of Governors must be given at the time of announcement of such decision. Appellant shall have ten (10) days from the date of the decision of the Board of Governors in which to file his petition with the district court clerk of the county in which he resides, setting forth the grounds relied upon for such appeal and, on this date, appellant will forward a certified copy of the petition on file in such appeal, by registered mail, to the Board of Governors, at its offices in Oklahoma City, Oklahoma. Such appeal shall be heard by the district court and determined upon the record. Within sixty (60) days following receipt by the Board of Governors of the petition for appeal the Board shall cause said record of all proceedings and evidence appearing before it to be transcribed and filed in the district court. Such appeal shall not stay enforcement of the Board's decision unless the district court shall, upon sufficient hearing, determine that the public health will not be adversely affected by such a stay of enforcement pending outcome of such appeal. The Supreme Court of Oklahoma shall have jurisdiction of appeal from the district court and the rules of civil procedure govern such appeals.

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§ 328.44. Hearings and investigations by Board -- Powers

In all cases involving revocation, suspension or probation or reprimand, the hearing shall be held in the county of the residence of the party charged or where the offense is committed. Upon the filing of a written complaint by any person, or upon its own motion when it has reason to believe a violation of the provisions of this act or of professional ethics has occurred, the Board of Governors shall have power to initiate and conduct investigations of all matters affecting or relating to the organization for its affairs, or the practice of dentistry, or the practice of dental hygiene, or the discipline of dentists or dental hygienists or any other matter within the jurisdiction of the organization; and in the conduct of such investigation the Board of Governors shall hear said complaint and shall have power to take and hear evidence touching the matters under investigation, administer oaths and affirmations, and upon such investigations, and upon trial or hearing of all matters, jurisdiction to try or hear which is given to said Board of governors, shall have power to compel the attendance of witnesses and the production of books, papers and documents pertaining to the matter under investigation, or to said trial or hearing, by subpoena issued as hereinafter provided. Whenever any persons subpoenaed to appear and give testimony or to produce such books, papers or documents as required by such subpoena shall refuse to appear or testify before said Board of governors, or to answer any pertinent or proper questions, he shall be deemed in contempt of said Board of Governors, and it shall be the duty of the presiding officer of said Board of governors to report the fact to the district court of

the State of Oklahoma in and for the county in which said investigation, trial or hearing is being held; thereupon the said court shall issue an attachment in the form usual in said district court, directed to the sheriff of said county, commanding said sheriff to attach such person and forthwith bring him before said district court. On the return of said attachment, and the production of the person attached, the said district court shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may impose, and the same punishment inflicted as in the case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before a district court of the State of Oklahoma. Any member of said Board of Governors shall have power to administer oaths and issue any subpoena herein provided for. A subpoena may be served upon any person in Oklahoma, with the same fees and mileage by any officer authorized to serve subpoenas in civil actions, in the same manner as is prescribed by the code of civil procedure for subpoenas issued oft of the district courts of this state. No witnesses shall be compelled to attend a hearing outside of the county where such hearing is held. Depositions may be taken and used in the same manner as in civil cases provided for.

§328.45. Notice and opportunity to defend

Any person complained against, as herein provided, shall be given reasonable notice in writing by registered mail and have a reasonable opportunity and right to defend against a charge, so preferred against him,

by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or to produce books and records, as herein provided.

§328.46. Record of hearings

A record of all hearings shall be made and preserved by the Board of Governors.